

petitions, or in their absence, by the Lord Ordinary officiating on the Bills. In these cases—*Christie v. Grieve*, 7 Macph. 378, and *Irwin v. Muir*, 1 R. 834—the Second Division had to determine whether the question which was brought under their cognisance was an interlocutory matter. If it was, then the statutory rule made that proper to the decision, not of the Division but of the Election Judges; and in both these cases the Division held the subject-matter in dispute was not of an interlocutory character, because in both cases the objection taken by the respondent, which formed the subject of debate, went to the root of the petition, and if sustained would have precluded any further procedure. The Court then laid down that questions of that character and quality were proper to the Division, and not to the Election Judges. I have referred to the 24th rule, but that does not exhaust the questions which are expressly appropriated to the decision of the Election Judges as distinguished from the Division, because Election Judges have also to fix, *inter alia*, the time and place of trial. It is expressly provided, for under the 17th rule—the time and place for trial, interlocutory matters, the trial itself, all are proper, not to the Division, but to the Election Judges. But in the two cases to which I have referred—*Christie v. Grieve*, and *Irwin v. Muir*—the Court held, as I have already mentioned, that questions going to the root of the petition, and requiring to be determined before anything else is done, are proper to the Division.

Now, we have to consider how stands the present application. It was suggested by Mr Dickson that it was necessary that the petition—when I say the petition I should amplify that by saying all petitions, even under the Act of 1868—must be got out of the First Division by being transferred or remitted to the Election Judges. I take that, upon the statute, the Rules, and the two decisions which I have referred to, to be a mistake. I do not think that the Division requires to remit the petition for the disposal of these matters within the statute and the Rules even to the Election Judges. The thing works automatically. If you have a thing proper to the Division in the sense of the two Second Division cases, come to the Division. If you have a matter proper to the Election Judges under the statute and the Rules, go to the Election Judges. Now, how stands the present application. It appears to me to depend, not on the discrimination of the duties of the Division and Judges, as those are determined by the Act of 1868, because it is expressly presented under the Act of 1883; it is an application for leave to amend the petition. Now, the Act of 1883 says that leave must be granted, if at all, by the High Court, and the High Court, as interpreted for Scotland, means the Division. Accordingly, here I think our course is quite clear. We are asked to administer the Act of 1883 on an application for leave to amend, and it is we alone who can grant

such leave. Accordingly, I think we must entertain this application, but entertain it for the purpose of performing the statutory duty under the Act of 1883, of granting or refusing leave to amend. Now, on the merits of the question, Mr Dickson, whose position I perfectly understand, made no observations—that is to say, he had no opposition to offer on the merits of the question whether the petition shall be amended unless he was right in his original suggestion, that that is no business of ours, and is to fall to the Election Judges. Now, I have looked at the proposed amendments. They seem to be legitimate and proper, and I am supported in that view by the absence of observations to the contrary on the part of Mr Dickson. I think we should grant leave to amend the petition by inserting in it the allegations contained in the note. By a singular view of what was fitting in such an application the petitioners have gone on in this application for leave to amend this petition, to pray over again that Mr Gordon be unseated. I am not disposed to take any notice of that application, because that is not matter for us. I propose to limit our action to what the Act of 1883 gives us power to do, that is, to give leave to amend. I think we should do so by allowing the petitioners to insert this statement of facts contained in this paper, and leave it so. After that the parties require no remit of ours to go to the Election Judges to get them to exercise the powers conferred on them by the Act of 1868, the Rules under that Act, and the Act of 1883.

LORD ADAM, LORD M'LAREN, and LORD KINNAR concurred.

The Court “granted leave to amend the original petition . . . in terms of the prayer of the supplementary petition.”

Counsel for Petitioners—Shaw, Q.C.—Dewar. Agent—James Falconer, W.S.

Counsel for Respondent—C. S. Dickson—J. Wilson. Agents—Mackenzie, Innes, & Logan, W.S.

Friday, October 18.

FIRST DIVISION.

[Dean of Guild Court,
Edinburgh.]

MACKAY'S TRUSTEES AND ANOTHER v. WILSON & SONS.

Dean of Guild—Warrant for Structural Alterations—Form of Warrant where Buildings already Erected—Process—Heritable Right—Onus probandi.

W., who had made certain structural alterations on his premises without obtaining a warrant from the Dean of Guild, and had thereby incurred a fine, brought a petition in the Dean of Guild Court, craving the Court to

grant warrant authorising the alterations which had already been carried out. Answers were lodged by M., who averred, *inter alia*, that his property had been invaded by W.'s operations. The Dean of Guild, in respect that these averments raised questions of heritable right which were not within his jurisdiction, sisted process to give M. an opportunity of raising an action in a competent court. As he failed to do so, the Dean of Guild recalled the sist, and granted warrant to the petitioners in terms of the prayer of their petition.

In an appeal by M., on the ground that the form of warrant was irregular, and that the *onus* of proving his title lay upon W.—*held* (1) that the form of the warrant, though inappropriate, did not render it invalid; (2) that the petitioner, having presented a *prima facie* title, the *onus* of disproving it lay upon the respondent, and that the Dean of Guild had acted rightly in calling upon him to raise an action in a competent court.

Opinions that where alterations have already been carried out, the interlocutor authorising them should take the form of approval of what has been done, and not of a warrant to sanction what was proposed to be done.

Messrs Charles Wilson & Sons, butchers, 19 South Castle Street, Edinburgh, erected a flue at the back of their premises to serve a furnace used by them in their business of sausage manufacturers. They did not obtain a warrant from the Dean of Guild authorising them to do so, and intimidation was made to them that they ought to have obtained a warrant, and a fine was inflicted for their neglect. Messrs Wilson accordingly, on 13th October 1894, presented a petition to the Dean of Guild, in which they craved the Court "to grant warrant to the petitioners to erect a flue entirely inside the property occupied by them at the back of 19 South Castle Street." The flue in question was that already erected by Messrs Wilson.

Answers to the petition were lodged by the trustees of Mr William Mackay, 52 Madeira Street, Leith, and by Mr Hugh Douglas, 14 West Nicolson Street. The respondents averred that the chimneys of their property at 158 and 162 Rose Street were carried up the back wall thereof adjoining the petitioners' premises, and that the flue in question had been connected with one of these chimneys. They averred that the use of this chimney for the purpose of a boiler, furnace, and engine flue was an invasion of their rights of property, and further, that it was a source of damage and nuisance to them.

On 28th February 1895 the Dean of Guild issued an interlocutor, by which he found that the respondents' averments "raise questions which are not within the jurisdiction of the Dean of Guild Court," and accordingly sisted process for twenty-one days, to admit of the respondents, if so advised, raising an action for the deter-

mination of the said questions in a competent court.

The respondents having taken no action, the Dean of Guild on 10th June issued a further interlocutor, by which he recalled the sist, and granted warrant to the petitioners in terms of the prayer of the petition.

The respondents appealed to the First Division of the Court of Session.

Argued for appellants—It was incompetent for the Dean of Guild to grant a warrant authorising the erection of buildings which were already completed. The form of warrant was altogether irregular; it should have been one approving of what had been done instead of authorising something to be done. The whole proceedings were irregular, and should be set aside. In any view, the warrant should only have been granted subject to the condition that the petitioners were able to establish their title against the objections put forward by the respondents. The Dean of Guild had been wrong in placing on the respondents the *onus* of disproving the petitioners' title. Such *onus* should always be borne by the aggressive party.

Argued for respondents—The petition was one in the ordinary form used in the Dean of Guild Court. Moreover, even if the form were irregular, the respondents could not show that they had been in any way injured by the irregularity, since they had known all along what the erection was for which the petitioners were craving a warrant. The Dean of Guild had acted quite rightly in taking up the position that the questions of heritable right raised by the respondents were outside his jurisdiction, and it was for them to disprove the petitioners' *ex facie* title.

At advising—

LORD M'LAREN—This is an appeal from an interlocutor of the Dean of Guild granting warrant to make certain structural alterations in the premises of the present respondents. It would appear from the proceedings that these alterations had in fact been made a considerable time before the warrant of the Dean of Guild was applied for, but that he, in the exercise of a very ancient jurisdiction, and on the application of his fiscal, fined the owners of the premises (the respondents) for not having obtained a warrant before proceeding with their alterations, and interdicted them from going on. To purge themselves of the contempt of which they had been found guilty, the respondents presented their application, which I think should have craved approval of the operations as executed, but which was put in the form of a petition for the approval of the works to be executed. Answers were put in, and the warrant appealed against is in the ordinary form granting authority to execute the alterations.

Your Lordships will, I think, agree with me that this is not an accurate form of warrant in such circumstances, and that it would have been better if the interlocutor, instead of taking the form of a warrant to

erect, had narrated that after examination the Dean of Guild approved of what had been done—using any appropriate language to distinguish between approbation of what had been done, and the ordinary case of approval of something proposed to be done. I cannot think, however, that the omission to notice this distinction should invalidate the warrant. At most the effect of such criticism would be to have the case remitted to the Dean of Guild to pronounce an interlocutor more accurate in point of form. But this would not be desirable, as the case has been defended, and is brought here in order that we may dismiss the application and give effect to the appellants' plea of right. That is a course which I think it is impossible for us to follow in view of the procedure which followed in the Dean of Guild Court. When it was seen there that the defenders' objections involved questions of property which were not appropriate to the jurisdiction of that Court, the Dean of Guild sisted process in order that an action might be raised by the defenders before a competent court for the determination of the question. The defenders did not avail themselves of that sistance; they took no proceedings, but asked for a judgment on the case as it stood. Accordingly, judgment was given for the petitioners approving of the work as erected.

It has been said that the *onus* lay upon the latter to clear their title by instituting an action for that purpose, but no authority for this proposition has been cited, and according to my experience it is contrary to the usual practice. To support an application to the Dean of Guild a petitioner must produce a title to property which is *prima facie* good, but if there is opposition by anyone who says that the subjects are not included in the petitioner's title, or that he has a right of servitude, then, unless the question be one within the jurisdiction of the Dean of Guild, it is his duty to sist the case in order to have the question determined in this Court. In such circumstances it is, according to all precedent, for the defender to raise the action. Now, the petitioners produced a *prima facie* title, and, in the absence of any attempt of the defenders to disprove it by an action, the Dean of Guild had no alternative but to act upon it and grant a warrant.

I think that no sufficient ground has been stated for our displacing this warrant, and accordingly I am for dismissing the appeal.

LORD ADAM—I agree, and while I think that the form of the warrant is not a happy one, and that it would have been better if it had been expressed as approving of works already executed instead of sanctioning their erection, it does not appear to me that the appellants have been in any way prejudiced by this incorrectness of form. Had the petition craved approval of works already executed, the appellants' objections to it would have been the same, viz., that the property was his, and that a nuisance was caused by the petitioners, and the Dean of Guild would have acted just as he has acted, that is to say, he would have sisted

the case to allow the objectors to make out their contention by raising an action. The only difference would have been that in the event of their not doing so, he would have pronounced an interlocutor approving of the works executed instead of a warrant to erect, but the appellants would have been in precisely the same position as they are now. Accordingly, their real objection is not to the form of the petition, but to having, as they say, the *onus* of raising an action thrown upon them. I agree that the Dean of Guild was quite right in doing so. There may be cases in which the *onus* should be on the petitioner, as for example where the subjects are *ex facie* the objector's property, and are not included in the petitioner's titles, but that is not the case here, and nothing has been said to show this should have been done. The result of the action would of course be the same on whichever party this *onus* lay, so that the question is comparatively unimportant. On the whole matter I agree that the appeal should be dismissed.

The LORD PRESIDENT and LORD KINNEAR concurred.

The Court dismissed the appeal.

Counsel for Petitioners and Respondents—Shaw, Q.C.—Graham Stewart. Agents—Curror, Cowper, & Curror, W.S.

Counsel for Respondents and Appellants—W. Campbell—Gunn. Agent—John Mackay, S.S.C.

Friday, October 18.

FIRST DIVISION.

[Lord Stormonth Darling,
Ordinary.

ROONEY v. CORMACK.

(*Ante*, vol. xxxii. p. 544—June 22nd 1895).

Expenses—Will—Reduction—Separate Defences—Liability of Defenders inter se for Expenses.

An action was raised for the reduction of a will against the testamentary trustee, and against the residuary legatee, a pupil child, who was represented by a *curator ad litem*.

By the will a legacy was bequeathed to the first defender, who was sole trustee, and who had prepared the will as the confidential legal adviser of the testator.

The will was challenged on the ground that it had been obtained from the testator, who was weak and facile, by fraud and circumvention on the part of the first defender. The case went to trial, and the jury returned a verdict in favour of both defenders.

Held that the pursuer was liable in expenses to the first defender only, and that the latter was personally liable in expenses to the other defender, on the ground that he had prejudiced the